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In The
Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A. F. AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF INTERNATIONAL HUMANITARIAN LAW EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PROF. BETH VAN SCHAACK
SANTA CLARA UNIVERSITY
SCHOOL OF LAW
500 El Camino Real
Santa Clara, California 95053
(408) 554-2349

HARRISON J. FRAHN IV*
**Counsel of Record*
PATRICK E. KING
ADAM S. ANDERSON
MICHAEL R. LIZANO
ANGELA M. MOORE
SIMPSON THACHER & BARTLETT LLP
2550 Hanover Street
Palo Alto, California 94304
(650) 251-5000

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are all experts in international humanitarian law, including law professors, lawyers, and a former principal of the International Committee of the Red Cross.[2] The subject matter of this brief – the detailed rules and regulations contained in the 1949 Geneva Conventions and their Protocols governing the circumstances and conditions under which States Party are permitted to confine and continue to detain combatants in an armed conflict – presents issues of international humanitarian law of which *amici* have firsthand knowledge as practitioners and scholars and about which they are deeply concerned. Fundamentally, *amici* wish to emphasize the richness and adaptability of international humanitarian law and its continued relevance to the armed conflicts of the twenty-first century.

Geoffrey S. Corn is Assistant Professor of Law at South Texas College of Law and the former Special Assistant for Law of War Matters to the U.S. Army Judge Advocate General.

Constance de la Vega is Professor of Law and Academic Director of International Programs at the University of San Francisco School of Law.

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[1] This *amicus* brief is filed with all parties' consent. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Counsel for *amici*, Simpson Thacher & Bartlett LLP, also represents two individuals, Ahmad Mohammad Al Darbi and Abdullah Alsaiari (a.k.a. Bassam Mohammad Al Dubaikey), in connection with petitions in federal court challenging their detention by the U.S. military at Guantanamo Bay. Messrs. Al Darbi and Alsaiari are not parties to the cases at bar.

Louise Doswald-Beck is Professor of Law at the Graduate Institute of International Studies and Director of the University Center for International Humanitarian Law in Geneva, Switzerland. Between 1987 and February 2001, she was a legal advisor at the International Committee of the Red Cross and became Head of the Legal Division in March 1998.

Laurel Fletcher is Director of the Boalt Hall International Human Rights Law Clinic. Professor Fletcher is active in the areas of transitional justice and humanitarian law.

Peter Honigsberg is Professor of Law and Director of the Legal Research, Writing and Analysis Program at the University of San Francisco. He writes and teaches about legal issues surrounding the international response to terrorism.

Deena Hurwitz is Director of the Human Rights Program and the International Human Rights Law Clinic at the University of Virginia School of Law.

Frits Kalshoven was Professor of International Law and International Humanitarian Law at Leiden University from 1967-1989. He is the author of *Constraints on the Waging of War*, among other publications in international humanitarian law. In November 2003, he was awarded the Henry Dunant Medal, named after the founder of the International Committee of the Red Cross.

Chimène Keitner is Associate Professor of Law at Hastings College of Law. She teaches and writes in the areas of international criminal law and international human rights.

Michael Newton is Acting Associate Clinical Professor of Law at Vanderbilt Law School, having previously served as Associate Professor in the Department of Law, United States Military Academy. As the Senior Advisor to the United States Ambassador-at-Large for War Crimes Issues, Professor Newton implemented a wide range of policy positions related to the law of armed conflict, including U.S. support for accountability mechanisms worldwide. From January 1999 to August 2000, he served in the Office of War Crimes Issues, U.S. Department of State.

John Quigley is Professor of Law, Moritz College of Law, The Ohio State University. He holds an adjunct appointment in the Political Science Department.

Naomi Roht-Arriaza teaches in the areas of international human rights, torts and domestic and global environmental law and policy at Hastings College of Law.

Michael Scharf is Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law. During the George H.W. Bush and Clinton Administrations, he served in the Office of the Legal Advisor of the U.S. Department of State, where he held the positions of Attorney-Advisor for Law Enforcement and Intelligence, Attorney-Advisor for United Nations Affairs, and delegate to the United Nations Human Rights Commission.

David J. Scheffer is the Mayer, Brown, Rowe & Maw / Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law. He is the former U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and exercised significant

responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (genocide, crimes against humanity, and war crimes) on a global basis.

Ron Slye is Associate Professor and Director of International and Comparative Law Programs at Seattle University School of Law. He teaches, writes, and consults in the areas of public international law, humanitarian law, and international human rights law.

Helen Stacy is a senior research scholar at the Center on Democracy, Development, and the Rule of Law at Stanford University's Freeman Spogli Institute for International Studies. She teaches at Stanford Law School.

SUMMARY OF ARGUMENT

The Geneva Conventions (the "Conventions") and their two Protocols provide detailed rules and protections governing the detention of combatants in armed conflicts. These rules govern the legality of an individual combatant's confinement, his right to challenge such confinement, the circumstances and conditions under which he may be interrogated, and his general treatment. A failure to comply with the Conventions' provisions has potentially serious consequences.

It is critical that Petitioners retain the ability to challenge the sufficiency of the current legal framework governing the terms and conditions of their confinement. *Amici*, therefore, respectfully urge this Court to allow Petitioners the opportunity to meaningfully contest the

legality of their detention under U.S. and international law, including the Geneva Conventions, their Protocols, and all domestic laws implementing them.

ARGUMENT

I. INTRODUCTION

International humanitarian law ("IHL"), also called "the law of war," describes the international rules governing armed conflict. As long as groups of people, and later states, have waged war, there have been rules in place defining acceptable behavior in armed conflict. Many of these customary rules now are contained in a web of bilateral and multilateral treaties, making IHL one of the most codified areas of international law. Customary international law continues to develop and supplement this extensive treaty regime. *See* Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

Modern IHL is founded upon the Geneva Conventions, which apply to "all cases of declared war or of any other armed conflict" as set forth in Article 2, common to all Conventions. The international community drafted these multilateral treaties in the aftermath of World War II to address the shortfalls of prior IHL treaties and to clearly prohibit atrocities such as those committed during that war. The United States played a leading role in this process. The Conventions now enjoy universal acceptance among the states of the world. Press Release, Int'l Comm. of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 21, 2006), *available at* http://

www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-news-210806 (last visited Aug. 21, 2007).

The collective goal of the Geneva Convention regime is to mitigate the effects of war by protecting persons who do not, or who can no longer, participate in hostilities. Accordingly, the Geneva Conventions provide specific protections to four classes of Protected Persons: the wounded and the sick in the field ("GC I"), the wounded and sick at sea ("GC II"), prisoners of war ("GC III"), and civilians ("GC IV").[3]

Two Additional Protocols supplement the Conventions with additional rules and protections. Additional Protocol I ("AP I") addresses international armed conflicts, whereas Additional Protocol II ("AP II") addresses non-international armed conflicts.[4] Although the United States has not ratified either Protocol, it has, nonetheless, recognized that certain key provisions dealing with the humane treatment of detainees constitute binding customary international law. In particular, Article 75 of AP I sets forth certain minimum guarantees that must be respected under all circumstances.

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[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

This Court has noted that the failure of the United States to ratify AP I is not due to objections to Article 75; rather, "the Government 'regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.'" *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (quoting William H. Taft IV, *Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (2003) (alteration in original)).

Though the four Geneva Conventions primarily apply to international armed conflicts, one exception is Common Article 3, which is common to all four Conventions. Common Article 3 – a "convention in miniature" – sets forth a minimum set of rules governing non-international armed conflicts. *See, e.g.*, GC III, art. 3. While brief, the Article reflects "the rules of humanity which are recognized as essential by civilized nations. . . ."[5] 3 Int'l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 35 (J. Pictet ed., 1960) [hereinafter GC III Commentary] (art. 3).[6] AP II supplements the rules contained in Common Article 3. *See* AP II, art. 2(1) (treaty applies to "all persons affected by . . . armed conflict").

Combatants in non-international armed conflicts are also entitled to the protections of Article 75 of AP I. This

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[5] *See also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27) (noting that Common Article 3 reflects elementary considerations of humanity).

[6] The International Committee of the Red Cross has promulgated the official Commentary to each of the Geneva Conventions. Members of this Court have recently looked to the official Commentaries to the Geneva Conventions for authoritative guidance in interpreting the meaning and intent of the treaties. *See Hamdan*, 126 S.Ct. at 2790 n.48.

Article sets forth a number of "Fundamental Guarantees" for those who are "in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol. . . . " AP I, art. 75(1). These Fundamental Guarantees mirror many of the provisions in the Geneva Conventions.

Elements of international human rights law and domestic law may apply alongside or in place of these IHL protections depending upon a number of factors, including factual circumstances, the classification of the conflict, and the existence of specific IHL rules governing the issue in question. To the extent that IHL does not apply, domestic law and international human rights law would govern a detainee's treatment. This brief addresses only those Petitioners whose detentions are governed by IHL, specifically the 1949 Geneva Conventions and their Protocols.

II. INDIVIDUALS WHO QUALIFY AS PRISONERS OF WAR MAY ONLY BE DETAINED TO PREVENT THEM FROM RETURNING TO THE THEATER OF WAR

GC III codifies the historic practice of interning combatants to prevent them from returning to the theater of war. GC III's protections apply to combatants who are prisoners of war ("POWs"). *See* GC III, art. 4 (defining POWs). Article 5 of GC III provides that

> [s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining POWs], such persons shall enjoy the protection of the present Convention until such

> time as their status has been determined by a competent tribunal.

Id., art. 5. *See also* AP I, art. 45(1).

A detainee therefore is entitled to a presumption that he or she is a POW until the state holding the detainee (the "Detaining Power") has proved otherwise. GC III, art. 5 (noting that individuals enjoy POW treatment "until such time as" the Article 5 tribunal rules otherwise); AP I, art. 45(1) ("A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the Detaining Power . . . . ").

The provisions and rules governing non-international armed conflict do not create a specific regime for the detention of individuals. Rather, the procedures applicable to their detention are governed by Common Article 3, AP II, and domestic law as buttressed by relevant provisions of international human rights law, such as the right of court review. *See, e.g.*, International Covenant on Civil and Political Rights, art. 9, ¶ 4, *concluded* Dec. 16, 1966, 999 U.N.T.S. 171.

III. WHEN COMBATANTS ARE DETAINED, THE GENEVA CONVENTIONS PROVIDE DETAILED RULES REGARDING THE CONDITIONS OF THEIR CONFINEMENT, WHICH MUST BE HUMANE AND COMPARABLE TO THE CONDITIONS ENJOYED BY FORCES OF THE DETAINING POWER

When combatants are detained, GC III regulates many of the quotidian aspects of such detention. *See, e.g.*, GC III, arts. 12-81. Some examples of these numerous regulations include:

- Detainees are to be, at a minimum, "quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area" including with respect to cubic space, general installations, and bedding. *Id.*, art. 25.[7]
- Conditions of confinement must make allowance for "habits and customs." *Id.*
- The Detaining Power must also afford "every guarantee of hygiene and healthfulness." *Id.*, art. 22. *Accord id.*, art. 29.
- The Detaining Power is under general obligations to provide sufficient and healthy rations that take account of the habitual diet of detainees. *Id.*, art. 26.

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[7] *But see* GC III Commentary at 501-02 (art. 108) (noting that such equal treatment is not appropriate where the conditions afforded the Detaining Power's forces fall short of the dictates of the Convention or of the principle of humane treatment); *id.* at 639 (art. 135).

- The Detaining Power must provide proper medical care to detainees as needed. *Id.*, arts. 30-31.
- Detainees must be accorded "complete latitude in the exercise of their religious duties." *Id.*, art. 34.
- Detainees must be accorded, among other privileges, the right to physical exercise (including in the open air), intellectual development, and recreation. *Id.*, arts 38, 108; GC III Commentary at 236-37 (art. 38) & 504 (art. 108).

In addition, and of particular significance, the Conventions dictate that combatants who are detained must be allowed to communicate with the outside world, subject to "necessary censorship." GC III, art. 71. *Accord id.*, art. 70. Denial of the right to communicate with the outside world, and particularly with family members, constitutes inhuman treatment prohibited by the Conventions. GC III Commentary at 627 (art. 130). The right to communicate includes the right to prepare, execute, and transmit legal documents. GC III, art. 77.

Moreover, the Power to which combatants owe allegiance must be informed of their detention and the measures taken for implementing the Conventions. *Id.*, art. 69. Combatants must also be given access to the International Committee of the Red Cross and other humanitarian organizations. *See, e.g., id.*, arts. 3, 9.

More generally, Common Article 3, which applies in both international and non-international armed conflicts, specifically proscribes "at any time and at any place whatsoever":

- violence to life and person;
- cruel treatment and torture; and
- outrages upon a person's dignity, in particular humiliating and degrading treatment.

GC III, art. 3. Article 75 of AP I adds to this list corporal punishment and the threat of any of the foregoing acts. *See also* AP II, art. 4 (setting forth similar fundamental guarantees in non-international armed conflicts).

IV. EVEN DETAINEES SUBJECT TO CRIMINAL AND DISCIPLINARY SANCTIONS ARE ENTITLED TO HUMANE TREATMENT AND CONDITIONS OF CONFINEMENT COMPARABLE TO THE FACILITIES GRANTED TO FORCES OF THE DETAINING POWER

Detainees may be subject to criminal and disciplinary sanctions for offenses committed either before or after capture. Under GC III, Articles 82-108 set forth the exclusive regime for effectuating such sanctions. GC III, art. 82 ("no proceedings or punishments contrary to the provisions of this Chapter shall be allowed."). Further, even where detainees are in disciplinary confinement, the Detaining Power must provide the principal safeguards of the Conventions. GC III Commentary at 503 (art. 108). Moreover, GC III applies with equal force even when detainees are prosecuted for events that occurred prior to capture. GC III, art. 85.

The Geneva Conventions contain a detailed set of rules setting out the due process rights of detainees. *See id.*, arts. 82-108. *See also* AP I, art. 75 (setting forth due process rights as fundamental guarantees applicable to all individuals detained in armed conflict). Similarly,

Common Article 3 also protects the core procedural rights of detainees. The Article prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized peoples." GC III, art. 3. *Accord* AP II, art. 6.

Confinement while awaiting trial for an indictable offense is permitted only where members of the armed forces of the Detaining Power would be subject to confinement if accused of a similar offense or if confinement is essential for national security purposes. GC III, art. 103. However, "[i]n no circumstances, shall the [pre-trial] confinement exceed three months." *Id.* If an individual is convicted, the type and execution of penalties post-conviction must be equivalent to those applicable to members of the armed forces of the Detaining Power. *Id.*, arts. 87-88.

V. THE CONVENTIONS PROHIBIT STATES PARTY FROM ABUSING DETAINEES DURING INTERROGATION OR FROM USING PHYSICAL OR MENTAL COERCION TO OBTAIN INFORMATION OR TESTIMONY

When a combatant is properly detained, the Detaining Power may attempt to obtain information from him or her. The Conventions, however, carefully regulate methods of interrogation in order to ensure humane treatment and a non-coercive environment. GC III Commentary at 163-64 (art. 17).

To the extent that combatants are questioned, interrogations must be carried out in a language they understand and under strictly non-coercive conditions.

GC III, art. 17. Under GC III, "[n]o physical or mental torture, nor any other form of coercion, may be inflicted" to secure any information whatsoever. *Id.* Detainees who refuse to answer "may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." *Id.* This prohibition includes practices "such as protracted questioning resulting in extreme exhaustion and nervous breakdown and carried out in such conditions that the accused is induced to admit anything at all in order to bring it to an end." GC III Commentary at 472 (art. 99). Similarly, no moral or physical coercion may be exerted on a detainee in order to induce him or her to admit guilt for an act of which he or she is accused. GC III, art. 99. Indeed, the Conventions specifically prohibit any use of chemical products to induce compliance or overcome willpower. GC III Commentary at 471-72 (art. 99).

In all situations, including interrogation, both Common Article 3 and Article 75 of AP I prohibit violence to life and person, cruel treatment, torture, and outrages against personal dignity, including humiliating and degrading treatment. GC III, art. 3; AP I, art. 75.

These provisions addressing interrogation respond directly to practices employed in World War II whereby certain categories of prisoners were placed *incommunicado* in "interrogation camps" before being sent to standard POW camps. GC III Commentary at 163 (art. 17). These camps were outside the control and oversight of Protecting Powers and the International Committee of the Red Cross. *Id.* The drafters of the 1949 Conventions made sure to prohibit not only various forms of "coercion" in interrogation, but also the use of "physical and mental torture." *Id.*

VI. THE CONVENTIONS ARE BASED ON SEVERAL FOUNDATIONAL PRINCIPLES

As demonstrated above, the Geneva Conventions and their Protocols set forth detailed regulations governing the detention, treatment, and prosecution of all combatants captured during armed conflict. These protections – which rest on the foundational principles of humane treatment, non-punitive detention until conviction, equality, and non-discrimination – safeguard the lives and dignity of combatants. In turn, the foundational principles provide guidance as to how the protections are to be applied in individual cases. Two of these principles, humane treatment and non-punitive detention, are particularly instructive here.

The principle of humane treatment requires that combatants who are in the "power of the enemy" and are outside of combat, whether they have laid down their arms, been captured, been injured, or fallen sick, must under all circumstances be protected and treated humanely. Humane treatment requires respect for the lives, dignity, and physical and moral integrity of all detained persons. *See, e.g.*, GC III Commentary at 627 (art. 130). The Detaining Power's duty to provide humane treatment has three major components: (1) the duty to provide basic life necessities (food, water, shelter, medical care); (2) the duty to respect human dignity; and (3) the prevention and prosecution of criminal conduct. *See* Maj. Thomas H. Barnard, *Preparing Interrogators to Conduct Operations Lawfully*, Army Law., Feb. 2007, at 9.

The principle of non-punitive detention prohibits detaining a combatant under penal conditions unless he or she has been charged with or convicted of a crime or

otherwise subjected to disciplinary measures. Thus, preventative internment must be distinguished from punitive detention. As described above, the Conventions do provide for the trial and punishment of combatants accused of committing crimes either before or after capture GC III, art. 103. Punitive detention, however, is permissible only following conviction of an indictable offense by a properly constituted tribunal within the terms established by the Conventions. *See id.*, art. 99.

VII. ANY BREACH OF ANY OBLIGATION ARISING UNDER THE CONVENTIONS IS SERIOUS AND MAY GIVE RISE TO STATE RESPONSIBILITY, INDIVIDUAL CRIMINAL LIABILITY, AND OTHER CONSEQUENCES

Compliance with the foregoing provisions and principles of the Conventions is a binding obligation that all States Party owe to one another. The Geneva Conventions establish two levels of responsibility for breaches: state responsibility and individual criminal responsibility. The responsibility for the treatment of detainees at all times rests with the State Party, regardless of which particular forces or military units may have captured or detained such persons. GC III, art. 12. GC III also makes plain that its obligations apply vis-à-vis the Detaining Power "from the time [detainees] fall into the power of the enemy until their final release and repatriation." *Id.*, art. 5.

The cornerstone of the Conventions' enforcement regime is the obligation that States Party impose individual criminal responsibility for certain violations of the Conventions considered to be war crimes. Such violations are "grave breaches" of the treaties. *Id.*, arts. 129-30. States Party must assert penal jurisdiction over individuals who

commit grave breaches regardless of the nationality of the perpetrator or victim. *Id.*, art. 129 ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.").

Examples of grave breaches under GC III include:

- Willful killing;
- Torture;
- Inhuman treatment;[8]
- Willfully causing great suffering;[9]
- Willfully causing serious injury to body or health; and
- Willfully depriving a prisoner of war of the rights of fair and regular trial.

Id., art. 130. It is notable that these provisions protect core due process rights alongside the physical and mental integrity of persons affected by armed conflict.

States Party are obliged to incorporate prohibitions against grave breaches into their domestic penal legislation and military disciplinary codes. Accordingly, the United States has incorporated liability for such grave breaches into its penal law under the War Crimes Act,

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[8] Inhuman treatment includes not only attacks on physical integrity or health, but also attacks on the dignity of a detainee. *See* GC III Commentary at 627 (art. 130).

[9] The offense of willfully causing great suffering is meant to cover moral suffering as well as physical suffering. *See* GC III Commentary at 628 (art. 130).

Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified as amended at 18 U.S.C. § 2441 (2007)), as amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1), 120 Stat. 2600, 2633-35 (2006). In addition, the War Crimes Act allows for the prosecution of certain breaches of Common Article 3, including torture and cruel treatment. *See* 18 U.S.C. § 2441(d).

If the commission of a grave breach is established, the State Party must immediately remedy the violation and punish those responsible. GC III, art. 132. Indeed, the failure to criminally prosecute individuals who have committed grave breaches is itself a breach of the Conventions. *Id.*, art. 131.

Preventing and punishing the commission of grave breaches of the treaties is a State Party's most important obligation; however, any breach of the Conventions is considered serious under international law. GC III requires States Party to "take measures necessary for the suppression of *all* acts contrary to the provisions" of the Conventions. GC III, art. 129 (emphasis added). Consequently, States Party may criminalize other breaches not designated as "grave." GC III Commentary at 624-25 (art. 129).

In addition to state responsibility and individual criminal responsibility, a failure by a State Party or its officials tc comply with the rules and protections set forth in the Conventions has other serious consequences. The moral authority of the Conventions is tied, in part, to their universal acceptance and implementation. The failure of any signatory to abide by the rules set out in the Conventions erodes the effectiveness of the provisions and protective system as a whole. Disregard, real or perceived,

of Convention-based obligations, particularly by a party as influential as the United States, weakens the entire international legal regime and invites other signatories to disregard their own treaty obligations. The breakdown of the system of rules and protections embodied in the Conventions is to the detriment of all States Party and all persons, both military and civilian, affected by armed conflict. *See, e.g.,* Brief Amicus Curiae of Retired Military Officers in Support of Petitioners, *Boumediene v. Bush* (No. 06-1195) & *Al Odah v. United States* (No. 06-1196) (U.S. filed Aug. 2007).

CONCLUSION

International humanitarian law has the noble objective of regulating the most inhumane of human situations – armed conflict. Perhaps more than any other body of law, international humanitarian law assiduously polices the line between civilization and chaos, humanity and brutality, dignity and degradation. Indeed, as described above, the Geneva Conventions are at their most detailed and resolute with respect to situations in which combatants are detained. Treaty drafters knew all too well that it is under such circumstances that an individual is most vulnerable to abuse. The Conventions also recognize, implicitly, that just as such abuse indelibly harms the victim, it also degrades the perpetrator.

States Party to the Geneva Conventions face great challenges in ensuring compliance and implementation of these rules in the fog of war. Nonetheless, the obligations contained in the Geneva Conventions reflect not only a universal moral standard, but also binding law, solemnly

reflected in the civil, penal, and military codes of the global community of signatories. It is imperative that the United States continue to support and adhere to the Conventions. *Amici* respectfully urge this Court to retain jurisdiction and to allow Petitioners a meaningful opportunity to challenge the legality and conditions of their detention under U.S. and international law.

For all of the foregoing reasons, *amici* respectfully ask this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

PROF. BETH VAN SCHAACK
SANTA CLARA UNIVERSITY
SCHOOL OF LAW
500 El Camino Real
Santa Clara, California 95053
(408) 554-2349

HARRISON J. FRAHN IV*
*Counsel of Record
PATRICK E. KING
ADAM S. ANDERSON
MICHAEL R. LIZANO
ANGELA M. MOORE
SIMPSON THACHER &
BARTLETT LLP
2550 Hanover Street
Palo Alto, California 94304
(650) 251-5000

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